Office-Supreme Court, U.S.
FILED
DEC 24 1964
JOHN F. DAVIS, CLERK

LIBRARY
SUPREME COURT, U. S.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1964

No. 674

JACUZZI BROS., INC.,
Petitioner,

vs.

LANDON, INC.,
Respondent.

INTERNATIONAL MANUFACTURING CO., INC., et al.,
Petitioners,

vs.

LANDON, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

FRANK A. NEAL,
1650 Russ Building,
San Francisco 4, California,
Counsel for Petitioners.

JAS. M. NAYLOR,
KARL A. LIMBACH,
1650 Russ Building,
San Francisco 4, California,
Of Counsel.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

Subject Index

	Page
Mandatory package licensing	1
Patent pooling	3
Conclusion	5

Table of Authorities Cited

Cases

	Pages
American Securit Co. v. Shatterproof Glass Corp., 268 F.2d 769, 122 USPQ 167	3, 5
Susser, et al. v. Carvel Corporation, et al., No. 355, October Term, 1964	5

Texts

Report of the Attorney General's National Committee to Study the Antitrust Laws, U. S. Govt. Printing Office, March 31, 1955, p. 243	4

In the Supreme Court
OF THE
United States

October Term, 1964

No. 674

Jacuzzi Bros., Inc.,	*Petitioner,*
vs.	
Landon, Inc.,	*Respondent.*
International Manufacturing Co., Inc., et al.,	*Petitioners,*
vs.	
Landon, Inc.,	*Respondent.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

MANDATORY PACKAGE LICENSING

Respondent attempts to justify its mandatory package licensing policy on antitrust authorities with the argument that this is not "a 'tying' situation since only one

product, the skim filter, is involved" (Respondent's Brief, page 7). This is clearly a tying situation since two patents are involved, and it is the two patents which Respondent has tied together. If the inventions of the two patents are used in a single physical product, the seller of the product might not be guilty of tying products under the antitrust laws. However, Respondent, under its mandatory package licensing policy, is not selling physical products. It is selling patent licenses. Respondent's "products" are intangible patent rights, and Respondent demands that a purchaser must buy the two different intangible products if he wants either.

These two intangible products, i.e., the two patents, must be different if the grant of the two patents was justified, and when Respondent ties the two products together, he prevents a prospective purchaser from evaluating either product on its own merits. If a prospective licensee believes that one patent of a package is valuable (valid and infringed) and another patent worthless (invalid) a tying practice forces the licensee to pay the price of the worthless patent to get the valuable patent. And herein lies the evil. The valuable patent enhances the market for the worthless patent and to that extent is misused because it is used to promote something outside of the scope of the valuable patent itself. As the Court of Appeals for the Third Circuit said:

> "Mandatory package licensing is no more than the exercise of the power created by a particular patent monopoly to condition the licensing of that patent upon the acceptance of another patent but that is too much. The protection, or monopoly, which is given to the first patent stops where the monopoly of the

second begins." (*American Securit Co. v. Shatterproof Glass Corp.*, 268 F.2d 769, 777, 122 USPQ 167, 174)

Both of Respondent's patents have now been held valid and hence valuable to some extent, and Respondent licenses them at a single price, so that it cannot be demonstrated mathematically as to which patent may enhance the other. However, this does not justify mandatory package licensing, because it is Respondent's tying of the patents which prevents their individual evaluation, and to the extent that Respondent hides the value of each patent in a joint license with the other, Respondent misuses both patents. The policy of mandatory package licensing is intended to and does in fact merge the two patents into a single club which is stronger than the mere summative strength of the individual patents, because the whole of the package is more difficult to evaluate and attack than the parts of the package.

PATENT POOLING

Respondent has attempted to restate the questions presented to avoid a major question presented by the petition, i.e., Question No. 2:

> "Whether patent owners may pool their patents for the purpose of having the holder of the pooled patents license them collectively and not otherwise."

Respondent was one of two parties who pooled the two patents in suit. These two parties contractually obligated Respondent to follow a policy of mandatory package licensing of the pooled patents.

Aside from the misuse problems in mandatory package licensing itself, Petitioners contend that mandatory package licensing is a restrictive practice which renders unlawful a patent pool or interchange. Thus, even if one person could lawfully follow a mandatory package licensing policy, a plurality of patent owners cannot combine or conspire to follow such a policy. The heart of this form of misuse is the combined effect of a restrictive practice (which one might engage in individually) and cooperative action (which may be lawful if it is not restrictive). As explained in the *Report of the Attorney General's National Committee to Study the Antitrust Laws,* U. S. Govt. Printing Office, March 31, 1955, at page 243:

> "Patent interchange may thus promote rather than restrain competition.
>
> On the other hand, the interchange of patents necessarily involves agreement and cooperation. If created with illicit purpose, or misused, it may lead to unreasonable restraints of trade and monopolization. Adjudicated cases demonstrate the manner in which entire industries may be regimented through misuse of the interchange. The patent is no shield for cooperative action outside the orbit of the patent grant, and those forming the interchange are subject to the prohibitions of the Sherman Act.
>
> Separating a licit from an illicit purpose in inception, the courts emphasize an interchange's activities as evidence of intent underlying its formation. An absence of restrictive practices evidences lack of improper intent. Contrariwise, an interchange is unlawful if formed with the purpose of regimenting an industry, fixing prices and eliminating competi-

tion, or threatening litigation with accompanying undue restraint of trade."

Respondent's brief is totally silent on the pooling problem.

CONCLUSION

The lower Court's decision is clearly in conflict with *American Securit Co. v. Shatterproof Glass Corp.*, 268 F.2d 769. The petition should be granted to resolve the conflict and to indicate clearly that mandatory package licensing of patents constitutes patent misuse in the same way as block booking constitutes copyright misuse.

This problem is related to package licensing of patents and trademarks in *Susser, et al. v. Carvel Corporation, et al.*, No. 355, October Term, 1964, and could be considered conveniently with that case. The tied and tying relation between Carvel's patents and trademarks is analogous to the tied and tying relation between Respondent's patents.

Dated, San Francisco, California,
December 22, 1964.

Respectfully submitted,
FRANK A. NEAL,
Counsel for Petitioners.

KARL A. LIMBACH,
On the Brief and Of Counsel.

JAS. M. NAYLOR,
Of Counsel.